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IN THE
Supreme Court of the United States
OCTOBER TERM, 1910.

HENRY C. RIPLEY, <i>Appellant</i> ,	}	No. 887.
<i>v.</i>		
THE UNITED STATES, <i>Appellee</i> .	}	No. 888.
<i>v.</i>		
THE UNITED STATES, <i>Appellant</i> ,	}	
HENRY C. RIPLEY, <i>Appellee</i> .		

On Appeal from the Court of Claims

REPLY BRIEF FOR APPELLANT RIPLEY

WM. H. ROBESON,
Attorney for Appellant.
BENJ. CARTER,
F. CARTER POPE,
Of Counsel.

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ON APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR CLAIMANT.

The brief filed for the Government demands of us in the first place a vindication of that resume of the facts of the case with which our brief commences. Our ~~statement~~ of the facts, of course, was not offered as a transcript of the findings made by the court. We respectfully insist, however, that it does not in any essential go outside the plain intent of that condensed narrative. Even on the unimportant question whether claimant "had scarcely entered upon the fulfillment of his contract" when his harassment and obstruction by the representative of the United States

in charge began, the findings are as clear as claimant has any reason to wish them. Below are the details of our proposition as found by the court:

Claimant, after repairing his tug, actually entered upon the execution of his contract on August 18, 1903. About two months later the inspector refused him permission to lay the crest blocks upon that portion of the core he had first completed, though it was manifest that it had fully settled and consolidated. Within these two months, however, claimant was permitted to lay some of the slope stones. But those had to be brought to the site of the work before they could be laid. The accumulation of slope stones or "large pieces of riprap" was necessarily almost coincident with the placing of the material in the core; yet when claimant undertook to store them on the work until they should be needed the inspector stepped in and, by construing the word "expense" to include "risk" and announcing that claimant would not be paid for any of the stones that might be dislodged and fall down the sides of the jetty (though they would there serve the purpose for which they and the other riprap were brought to the work) compelled him to store them on the shore, some distance away, and thereby added considerably to the cost of the work.

Necessarily the work was at a very early stage when the inspector rejected claimant's proposition that the stones be selected at the quarry, he (claimant) bearing the expense. (Finding IX, Transcript, p. 26.)

Defendant's First Specification of Error.

The first error which counsel for the United States asks this court to find in the judgment is in the matter of the crest blocks at first rejected by the inspector but afterward, as a rule, accepted and used. It is true, as stated by

counsel, at pages 7 to 9 of their brief, that the subject of the dispute between claimant and the Government's officers was the method of measuring the blocks. Since the specifications required in the stones a certain weight per cubic foot and since the cubic contents could not be calculated except from mean measurements, claimant contended that by the very letter of his specifications (regardless of the character of stones used on the previous work of the Aransas Pass Harbor Company) the mean dimensions of the stones should be the test; that this test would not admit any blocks of bad shape because the specifications also required approximate rectangularity. The Court of Claims in its Finding VI (Transcript, p. 24) sets out claimant's letter of May 22, 1904, in which he says that the test applied by the inspector was not contemplated at the outset; and there is not a word in the findings to contradict this assertion.

But there are also to be considered the specifications of the Aransas Pass Harbor Company, by which, under the terms of the appropriation for claimant's work, his specifications were dominated. The particular paragraph of the earlier specifications with which we are here concerned appears at page 3 of the transcript, headed "Blocks." That required, as assurance of fit stones for this final and most important stage of the work, a certain specific gravity and a certain bulk, nothing more. In so far as they did not clash with the specifications of the Aransas Pass Harbor Company, and no farther, the specifications of claimant's contract were valid. Their requirement of certain dimensions was not irreconcilable with the former specifications; it was a mere detail by which, with the aid of the detail as to specific gravity, to require stones of the bulk for which the old paragraph called, viz., two to five tons weight. But if these new specifications are to be construed as making the fitness of the stones to turn

on their *extreme* measurements (which could have no relevancy to their weight per cubic foot) they introduced a feature which is not merely not included in, but is antagonistic to the earlier requirement; they set up a test radically different from that of mere size and weight. To save the new paragraph from cancellation it must be construed to require that the stones should have the mean dimensions named and the weight named per cubic foot as calculated from those dimensions.

It is inconceivable that the engineer officer in charge in May, 1904, would have yielded to claimant's contention if that had not been clearly correct, no matter what views the engineer and the other representative of the Government having to do with the construction may have held before that time. Captain Jadwin had now heard claimant's side of the case and doubtless had made some investigation of his own, and he unquestionably was led to the conclusion that the purpose of Captain Riche, who had let the contract, and of claimant, was what claimant stated it to be.

The argument of counsel at pages 24-26 of their brief to the contrary notwithstanding, the Court of Claims has in effect found that none of the crest blocks were rejected for any other reason than that by extreme measurements they were not of the dimensions named. The court finds that "claimant contended that said specifications provided for mean measurement of the blocks, while the inspector adopted extreme measurements and a large number of blocks were rejected by said inspector as not conforming to the specifications." By no rule of construction can this statement be made to include rejections with respect to anything else but the dimensions.

If, as counsel argue, the inspector was acting in good faith when he tested these stones by extreme measurements, that is nothing to the point. The question here is one of

interpretation of the contract, purely and simply. However honest the inspector may have been in construing the contract wrongly and thereby injuring claimant, the Government is answerable for those injuries. The cases cited for the Government, where officers were upheld in the exercise of discretion in matters committed to their discretion, are not in point. It was for the inspector to determine the dimensions of the stones by correct measurements, and then to determine their weight per cubic foot. It was not for him to say whether he should take extreme or mean measurements. That question (the interpretation of the contract) is for the court's determination.

It is apparent, of course, that the Court of Claims rendered judgment with respect only to the stones improperly rejected.

Defendant's Second Specification of Error.

Here the exception is to the rendition of any judgment whatsoever in claimant's favor on Finding VII (Claimant has excepted to the judgment with respect to this finding as insufficient in amount). It is contended on behalf of the Government that the finding of the court that "it was manifest" that the core had fully settled or consolidated so as to permit the laying of the crest blocks at the times when the inspector was refusing the permission on the ground that the core had *not* sufficiently consolidated is not a finding of bad faith or such gross error as to necessarily imply bad faith; also that the finding does not show that claimant complained of the refusal of the permission at the time by appealing to the district engineer.

If it was "manifest" that the core had sufficiently consolidated the fact must have been clear to the inspector, who nevertheless denied it. Also, if it was manifest that the

core had sufficiently consolidated when the inspector was saying it had not, it must be "manifest" to the court that the inspector's contrary allegations was false. How then can anything but bad faith be made out of this finding? If offensive terms must be avoided, claimant could not have chosen more fortunate language than the court has chosen for him.

The curious argument is made by counsel on page 32 of their brief that the finding of the court that "it was manifest that large parts of the work done by him had sufficiently [the court said *fully*] settled and consolidated" is in effect merely an expression of opinion of the court that because of the lapse of time the core "must have" sufficiently consolidated. The conclusion to which this would lead is that there was no evidence from which the court could make a finding. In fact the "opinion" or "judgment" is not that of the five judges of the Court of Claims but of witnesses amply qualified to speak. While we are not at liberty to discuss or even to cite the evidence, it seems proper that we say to this court that experts who have been at one time or another employed on this identical improvement testified that, for full consolidation of a substructure entirely new, as short a time as one-fifth of the wait required by the inspector on the core completed by claimant, on a foundation previously laid, was all that could be needed.

The Court of Claims, of course, may well have been impressed by the fact that claimant, before being allowed to lay the crest blocks, was required to build 1,400 feet of core on a perfect foundation, when prior contractors were required to keep the raw foundation only 300 feet in advance of the end of the completed work and to place the crest blocks whenever and wherever the core had been completed and the slope stones laid. (Aransas Pass Company's Specifications, Transcript, p. 2.)

As to the second objection, viz., that claimant did not appeal to the district engineer, it might as well be argued that he did not appeal to the Chief of Engineers, or, indeed, to the President of the United States. Paragraph 61 of the specifications set out in the petition, which the Court of Claims makes a part of Finding IV (Transcript, p. 23), contained this provision:

"Between Stations 20 and 27 and from the vicinity of Station 55 seawards the method of construction shall be as follows: A mound of small riprap shall first be built up over and around the existing structure to about one foot elevation. When in the judgment of the United States agent in charge this mound has become sufficiently consolidated, its gaps and interstices shall be filled and its crest levelled with small riprap, generally one man stone. Large blocks shall then be bedded in crest of mound, etc."

Other provisions in this same paragraph make it clear that the "U. S. agent in charge" referred to was the identical person who in fact refused the permission, viz., the inspector, and that the decision of these questions was committed to him alone. It must have been so. To require or to permit appeal from the daily and hourly decisions of the inspector on the details would have been to postpone intolerably the completion of the work.

If claimant did not protest to the engineer against the decisions of the inspector (something that the findings do not show and that we do not admit to be true) this might be regarded as evidence that the inspector was not refusing him a right to which he was entitled. But we are not concerned here with evidence. We are dealing with the fact itself, as found by the court, and the fact is that the inspector did forbid the imposition of the crest blocks during a period

when the structure was ready to receive them and when they were of the greatest importance to the speedy and economical prosecution of the work.

Neither of the cases cited by counsel (*Lewman v. The United States*, 41 Ct. Cls., 470, and *Madison J. Bray v. The United States* (No. 22954, Court of Claims, decided February 13, 1911) is in point. In the *Lewman* case the engineer officer and not the inspector was made the arbiter of such questions as might arise between the claimant and the inspector. The provisions of the specifications in this respect was set out on page 476 in the opinion of the court. In the *Bray* case the very matter quoted from the opinion of the court by defendant's counsel shows the inapplicability of that case as an authority, because the claimant did not protest to the officer whom the specifications made the final arbiter. In this case at bar, as we have already shown, no appeal was provided from the agent in charge and his word was law. The appellate jurisdiction of the engineer in charge related solely to the quantity and quality (Contract, par. 2, Transcript, p. 10) and that jurisdiction *was* invoked in the matter of the rejection of the crest blocks. The mere silence of the Court of Claims on a purely immaterial proposition is no basis for defendant's argument.

In their discussion of the extent of the delay also defendant's counsel, we submit, are in error. It is finally argued that if the Government is chargeable with any delay whatever "it can only be for the number of days which the court finds the particular acts complained of delayed the work." Thus far we agree with counsel. But they go on to say "the finding is for seventy days all told." If this statement were correct, and if that were the ultimate fact, we would not be appealing to this court. There is not the slightest element of speculation in our calculation of the time when claimant would have finished the work, set out on page 14

of our original brief, unless as to the two days April 26 and 27, 1904; for Finding VII, taken in connection with Finding XVII, makes it absolutely certain that the work would have been completed by April 28 but for the refusal of the permission to lay crest blocks. However, claimant's progress before he began the laying of the crest blocks was much slower than it was afterwards, and if the Court of Claims had made its findings in greater detail, we might justly contend that he would have completed the work at an even earlier date than we have calculated. In making this calculation we took no account of the delay by reason of the rejection of the crest blocks as counsel for the United States have it on page 35 of their brief, because we took no exception to the judgment of the Court of Claims on Finding VI. That delay is worked into the first, fourth and fifth items in our recapitulation on page 19 of our original brief just as allowed by the Court of Claims.

That this court may surely see the facts as we do, we coordinate below the findings of the court directly in point:

"Between Stations 20 and 27 and from the vicinity of Station 55 seawards the method of construction shall be as follows: A mound of small riprap shall first be built up over and around the existing structure to about one foot elevation. *When in the judgment of the U. S. agent in charge this mound has become sufficiently consolidated*, its gaps and interstices shall be filled and its crest levelled with small riprap, generally one man stone. Large blocks shall then be bedded in crest of mound in two rows breaking joints with their longest dimensions parallel to the axis of jetty in such manner that voids under the placed blocks will be at a minimum, and side slopes and remainder of crest shall then be covered with large riprap. When completed, the jetty shall present at least as smooth and even a surface to the waves and as finished appearance as the

portion between Stations 27 and 40, which was constructed under a prior contract. *Where the uncompleted structure is liable to serious damages from waves, as small a length of the jetty as practicable shall be under construction at any one time.*" (Petition, Transcript, p. 6, Finding IV, p. 23).

"Claimant entered upon the performance of said contract on the 18th day of August, 1903, and completed 2,100 feet of the jetty from the outer end thereof shoreward, when operations under the contract ceased, about September 17, 1904, owing to the exhaustion of the appropriation therefor." (Finding VI, p. 23.)

"When claimant had completed from 100 to 200 feet of the core he requested from the inspector in charge permission to begin to lay crest blocks, which was refused on the ground that the core had not consolidated. By the end of December, 1903, claimant had completed 400 to 500 feet of the core and again he requested permission to impose the crest blocks. Said inspector *refused and continued to refuse permission to lay crest blocks until May, 1904, at which time between 1,400 and 1,500 feet of the core had been repaired and completed. Commencing in October, 1903, when about 300 feet of the core had been built up to the required elevation, slope stones were laid on the jetty which afforded some protection from the action of the waves to the riprap already constructed, but not as much protection as the crest blocks would have afforded. When claimant was thus laying the slope stones, and throughout December, 1903, and January, February, March and April, 1904, it was manifest that large parts of the work done by him had fully settled and consolidated. If claimant had been permitted to lay the crest blocks, from that time on as the work progressed there would have resulted an additional protection which would have enabled him to work 60 days more than he did between that time and May 7, 1904, date the first crest blocks were laid. When claimant was seeking permission to lay the crest blocks as aforesaid the inspector, in refusing same,*

alleged as a reason that the jetty had not had sufficient time to consolidate, and it does not appear that any other reason was at any time given by said inspector for so refusing." (Finding VII, p. 25.)

"The total cost to claimant of performing the contract exclusive of the cost of the granite and the cost of transport, and fitting up and repairs to barges, was \$63,780. The total number of days from the beginning to the completion of said work was 392, making an average daily cost to the contractor of \$162.70.

"The work was completed on September 17, 1904. The number of days actual work performed was 131, of which 58 were subsequent to the 30th day of April, 1904." (Finding XVII, p. 28.) (*Italics ours.*)

How can it possibly be said in view of all these findings that claimant was delayed for only 60 days? We do not see how the demonstration can be made clearer than it is on page 14 of our original brief. It is respectfully submitted that our calculation is correct and should be followed by this court.

The damages we have computed which were inflicted on claimant by this unlawful denial of permission to lay the crest blocks *alone*, amount to \$28,779.80, as follows:

145 days delay at \$162.70.....	\$23,591.50
Loss of claimant's own time for four months and twenty-five days at \$750 per month	3,625.00
Inspection charges for four and five-sixths months at the average per month of \$323.45 as shown by Finding XVI, Transcript, p. 28...	1,563.30

Claimant could not object to the restriction of his reimbursement to the mere days (70) of the delayed work if the court had applied to those the multiplier proper to them.

The court took the cost of the work, exclusive of materials, and divided that by the entire number of the days elapsed from the commencement to the end of the work. This calculation, of course, yielded the per diem of cost of labor, etc., for the elapsed days. If the per diem for the days of work is to be ascertained, the cost obviously must be divided by the total of the days of work, 131. The per diem thus computed is \$408.99. By this multiplier the reimbursement due claimant for the 70 days of work is \$28,679.75 instead of \$25,218.50, the total of items 1 and 3 in our recapitulation. (Original brief, p. 19.)

Defendant's Third Specification of Error.

On defendant's part there is assigned as error the reimbursing claimant a part of the inspection charges. The court allowed \$320 because of the delay in the grounding of claimant's tug and \$125, the balance of the February charges for the delay resulting from the quarantine. It also relieved against the inspection charges for 10 days and 60 days in the matter of the rejection of the crest blocks and the denial of the permission to lay those respectively, at the average rate of \$323.45 per month. The judgment in this latter respect is also the subject of our third specification of error. (Brief, pp. 10, 15 and 16.) If defendant's contention is correct with respect to all the inspection charges except those reimbursable by reason of the denial of the permission to lay the crest blocks it would mean a reduction of \$552.80 from the amount stated in our recapitulation on page 19 of our original brief—that is \$125, plus \$320, plus one-third of \$323.45, or \$107.80.

As we read the provisions of the contract it required that for all delays not the fault of the claimant, the engineer officer should grant him an equivalent exten-

sion of time. Of course, if there had been any question, or doubt, that the epidemic or the grounding of the tug were causes of delay, then the function of the engineer officer was to decide that question in good faith. It is conceivable that, though these circumstances might apparently have caused some delay, they really had no such effect because for other reasons claimant might not have been ready to proceed. In other words, it was obviously in contemplation of the parties that, if the performance of the contract was delayed by circumstances beyond the control of the claimant, he should be relieved of the expenses of superintendence for an equivalent period; otherwise that provision in the contract would have been mere surplusage. Now, as to the delay caused by the epidemic, the engineer officer took no notice of any delay beyond the more duration of the quarantine. That is, instead of determining what the delay arising out of this cause was, he arbitrarily allowed a remission of the charges merely for the period of the proclaimed quarantine. The other delay due to the grounding of the tug he ignored altogether. In short, he did not exercise the functions of his office and discharge the duties imposed upon him by the contract. The judgment of the Court of Claims on Findings XIII and XIV should therefore be affirmed.

Objection is also made on the Government's part to the remission of any inspection charges for the ten days' delay caused by the rejection of the crest blocks and for the delay caused by the refusal of permission to lay the crest blocks. In our discussion of the defendant's first and second assignments of error, we have given our reason why the first of these items should be affirmed and the second should be increased.

Defendant's Fourth Specification of Error.

Defendant objects to the allowance of any judgment to claimant for the value of his personal services in superintending the work during any portion of the delay resulting from causes not the fault of the claimant. On our part we have requested this court to allow to claimant the value of his personal services during the time alone when he was delayed by the Government's unlawful interference with the contract. (Claimant's original brief, p. 15.) It is submitted that this is a proper item for judgment. The law is clear that where one party to a contract unlawfully interferes with the other's performance, the latter may recover the value of his lost time, especially where there is no allowance for the loss of prospective profits.

Kelly v. The United States, 31 Ct. Cls., 369, 375.
United States v. Behan, 110 U. S., 338, 345.

No allowance has been made to claimant for the loss of prospective profits. The court has simply allowed the actual damages arising out of some of the delays according to the nature of those delays, including an entirely insufficient award for claimant's own time. Finding XVIII (Transcript, p. 28) is as follows:

"Claimant, under the requirements of paragraph 35 of the specifications, personally superintended said work the whole time. The value of his personal services in so doing was \$750 per month, but it does not appear that at this particular time he had any other enterprise under way or any other employment."

Obviously the clause: "but it does not appear that at this particular time he had any other enterprise under

way or any other employment," is pure surplusage. If his time was *worth* \$750 per month he should be *allowed* \$750 per month during that portion of the delay caused by the unlawful interference by the Government's agents—and what this should be we have shown on page 15 of our original brief.

Board and Cost of Labor.

The amounts claimed of this court on these two items are respectively \$560 and \$87.16. The allowances are objected to by defendant and are the subject of our fourth and fifth assignments of error discussed on pages 17 and 18 of our original brief. We have said there all that seems to be necessary to cover our contentions on these items. It only remains to be said that if the engineer officer had performed the duties laid upon him by the contract he could not have allowed claimant only \$2.00 per day for labor costing him \$6.00, or \$15.00 per month for board at this remote point on the Texas coast, when it was costing him \$20.00 per month to board his own employees. The officer did not even profess to allow the claimant the cost of either the board or labor.

CONCLUSION.

It is respectfully submitted that these findings clearly indicate the judgment which should be awarded to claimant. A series of errors are shown to have been made against a man whose patience may be likened unto that of Job. One of these errors was such a gross misuse of authority that the contractor would have been justified, on account of the expense, in abandoning the contract; but instead of doing this, he went ahead and completed his work. Throughout the whole of a long

brief in defense of the Government not one word is said in explanation of the assessment of the inspection charges during the delay resulting from the alleged refusal of that core to consolidate—which obviously could not have been claimant's fault. Perhaps the reason is that it is not susceptible of explanation.

It is clear indeed that all of the delays with which these appeals deal were caused by the agents of the Government and demand reimbursement of claimant's losses.

WM. H. ROBESON,

Attorney for Claimant.

BENJ. CARTER,

F. CARTER POPE,

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**Brief for Henry C. Ripley on Additional
Findings of Fact by Court of Claims.**

Under this court's mandate of April 24, 1911, the Court of Claims has made supplemental findings of fact as below:

The court finds, supplemental to said Finding VII, as follows:

(1) When denying permission to the claimant to lay crest blocks, as stated in Finding VII, the inspector in charge knew from the time which had elapsed that large parts of the core theretofore completed by the claimant had fully settled and

consolidated and were ready for the crest blocks to be laid thereon.

(2) The refusal of said inspector to allow crest blocks to be laid at the time requested in said Finding VII, thereby unreasonably delayed the work and was, on his part, a gross mistake. There is no other evidence of bad faith on the part of the assistant engineer in immediate charge.

(3) There is no evidence to show that any protest or notice was ever made to the engineer in charge (whose office was in Galveston) or to the Chief of Engineers (whose office was in Washington) or to any officer other than the Assistant Engineer in immediate charge of the work of inspection."

It is to be noted at the outset that, while the Court of Claims, at two places in the supplemental findings, has followed the terminology of the mandate and of the original findings in saying "inspector in charge," it has at two other places employed the actual title of this officer, namely, "Assistant Engineer."

Animus of the Assistant Engineer.

The opinion of this court, under which the Court of Claims was directed to make these supplemental findings, is in a tone of surprise that the record lacked distinctness on the point of the knowledge of the Assistant Engineer, during some six months, that the core of the jetty was in that condition which entitled the contractor to lay the crest blocks and so bring the structure above the water level. The supplemental findings cure this defect. They, however, go something beyond that purpose. Having convicted the Government's agent of a conscious invasion of the contractor's rights in this matter of the capping of the structure, they say "there is no other evidence of bad faith on the part of the Assistant Engineer in immediate charge."

While the Court of Claims was not commissioned by

the mandate of this court to inquire of manifestations by the Assistant Engineer of bad faith elsewhere than on the point of the laying of the crest blocks, there is no serious reason to complain on Mr. Ripley's behalf of what the court has gratuitously said.

The relevancy of that added sentence is to original Findings VIII and X, on the subject of the *building up* and *leveling* of the core. These details of the construction, together with the authorizing of the capping, were the only matters of which the Assistant Engineer had discretion. As to the matters narrated in those two findings the court acquitted this officer of wrongdoing; and it now does the same thing in different language. This, however, has not the slightest pertinency to the fact that when the parties came to the question of laying the crest blocks the Assistant Engineer betrayed a purpose to deny to Ripley his contract rights.

We take it a conviction of one offense against the penal laws was never set aside in any court on proof that the defendant had never committed any other crime.

In the judgment of the Court of Claims, of course, nothing was allowed on the items of the complaint to which Findings VIII and X relate.

There is no coherence in the supplemental findings of the Court of Claims except on the reading we are here giving them. It only remains then to say in this connection that the Court of Claims, having convicted the Assistant Engineer of consciously invading claimant's rights in the matter of the laying of the crest blocks, has subtracted nothing from the contractor's right of action when it refrained from employing words implying utter depravity of purpose. The case would not have been affected, indeed, if the court had positively found that in this matter the Assistant Engineer, with no ill feeling of his own to gratify, merely subscribed to unfriendly purposes of his superiors toward the contractor,

or that, with no thought whatever of his superiors, he felt it a high duty to ruin this contractor and thus exemplify the fate of those who would lead the Government, in these great improvements, into the adoption of a particular design which he deemed injurious or ineffective. It is sufficient that (from whatever motive) he asserted what he knew was not true; that he consciously denied claimant a right which the contract gave him. The United States Government can never go free of responsibility because its agent was fanatically sure of his duty to take away a lawful right from a contractor.

Notice to Superior Officers of Assistant Engineer's Action.

The Court of Claims had taken the view that the contract did not require, or authorize, any appeal, in the matter of laying of the crest blocks, from the Assistant Engineer to the superior officers; and therefore nothing was said in the findings on the fact of such appeal or on any fact related thereto. In the opinion of this court nothing whatever is said in this connection; but the mandate inquires "whether at any time the claimant notified the engineer officer in charge or the Chief of Engineers that the inspector in charge wrongfully refused to permit the laying of the crest blocks, and if such notice was given, whether it was oral or written, when the notice or notices were given, and what action, if any, was taken by such superior officer"—this and nothing more. Thus the Court of Claims was not commissioned to find anything but the fact of appeal or notice, *vel non*, from the Assistant Engineer to the Engineer or the Chief of Engineers, and the supplemental finding is confined rigidly within the terms of the commission. It will readily be seen that if no such appeal was ever intended by the parties or that, as it turned out, it was not possible to take such an appeal, the claimant, on the present record, may suffer injustice.

Those parts of the specifications which are before this court serve in some measure to distinguish the functions of the Assistant Engineer from those of the superior officer. In fortunate juxtaposition paragraph 41 names the "U. S. agent in charge" (this Assistant Engineer) as the judge of the placing of materials, and paragraph 42 makes the Engineer the judge of the necessity of the contractor's furnishing labor and appliances to the Government for its own use, or of his boarding the Government's employees (Rec., p. 5). Paragraph 61, relative to the laying of the crest blocks, again, names the "U. S. agent in charge" as the judge and does not mention the Engineer (Rec., p. 6). There is nothing in this record, however, to show whether Ripley, if he had desired, could have appealed to the Engineer in this matter of the capping of the structure. We must assume that if this court should take the view that the contractor should have appealed to the Assistant Engineer, it will wish to know how the case stands on the two other points. We can not believe this court would not, in the event we suggest, give weight to such conditions of fact as the following—which, of course, we submit purely as hypotheses.

That the specifications and contract nowhere provided for any appeal from the decisions of the Assistant Engineer in charge at the jetty regarding the readiness of the structure to receive the crest blocks;

That the specifications as a whole differentiated clearly between (1) the Engineer at Galveston and (2) "the Assistant Engineer in charge" or "U. S. agent in charge" in all matters which were to be determined by the judgment of the one or the other;

That in the plan of the work, laid out after the contract was signed and approved, there was no provision for any review of such decisions of the Assistant Engineer;

That there was not in fact present at the District Engineer's office in Galveston or at the site of the work, in the months of October, November, and December, 1903, and January, 1904, when this dispute regarding the laying of the crest blocks was acute, any officer of the United States to whom appeal could be made from such decisions of the Assistant Engineer;

That in the course of this dispute the Assistant Engineer always averred that the matter was absolutely to be controlled by his decisions;

That the Assistant Engineer himself constantly communicated to the Galveston office the contractor's objections to said delay.

Since this court, without setting aside the submission of the case, has of its own motion called on the Court of Claims for some amplification of the record, it does not seem proper that we make any formal motion in this connection; but we respectfully submit that if the court should take the view that there was a *prima facie* necessity for the contractor to give the indicated "notice" to the Engineer at Galveston, the case should again be sent back to the Court of Claims with directions to make findings on the above points of fact and on any others touching the relative functions of the Engineer and the Assistant Engineer in charge at the site of the work.

Though the contractor was not obliged to appeal from the decisions of the Assistant Engineer in charge, it is conceivable that, not having made such appeal or given any notice to the Galveston office, he could be held, in a proper state of facts, to have acquiesced in the rulings of the Assistant Engineer; but the original findings distinctly rebut all presumption of such acquiescence. It is recited that the contractor's application for leave to begin laying the crest blocks was first made when he "had completed from one hundred to two hundred feet of the core;" that he, when he had "completed four

hundred to five hundred feet of the core . . . again requested permission to impose the crest blocks" and the Assistant Engineer "continued to refuse permission to lay these blocks until May, 1904" (Finding VII).

It is clear that, so far from acquiescing in the decisions of the Assistant Engineer, Ripley was constantly protesting to him and renewing his request for leave to do what he was entitled to do under the contract.

To say nothing more of the findings and their omissions, the very nature of the case forbids that the contractor was obliged to appeal from the decisions of the Assistant Engineer. The matters which were subject to that officer's discretion all concerned the daily progress of the work, and a decision on any of them involved visual examination of the structure. If the contractor for protection of his rights was required to invoke a review of the action of the Assistant Engineer, this would mean the stoppage of the work while the Engineer (if he happened to be present) could come at his convenience from Galveston, 300 miles away. The execution of such a project, in that way, we submit, is unthinkable.

If, however, the contractor was by implication obliged to appeal from the Assistant Engineer to the Engineer, he was equally bound by implication to appeal, when necessary, beyond the ~~Assistant~~ Engineer, to the Chief of Engineers, the Secretary of War and possibly to the President. But what would become of the work in the weeks or months consumed in such appeals; and for what sums would not the Government be answerable in damages when it was finally determined that the Assistant Engineer had acted wrongfully.

We do not find in any of the adjudicated cases the doctrine that appeals lie, in these matters of discretion, from the subordinate officer trusted with the discretion to his superiors, rank by rank. On the contrary the courts have declined to question the decisions of officers

having this discretion, in however low rank, whenever they have honestly exercised that discretion; this on the ground that the parties have made that indential officer, on the one condition of entirely good faith, the arbiter.

In the present case the parties had made the Assistant Engineer the arbiter of the readiness of the core of the jetty to receive the crest blocks; and against his decisions in that matter, if made in perfectly good faith, neither party could have redress. For reasons satisfactory to the parties, that is to say, there was to be in this particular matter this one arbiter and none others; and this for the evident reason that there could be no other without serious detriment to the work. It is inconceivable, we submit, that this contractor (who, as the court has found, had a hand in the drawing of the specifications) would have agreed to the designation of any other arbiter or would have bid on the work, and signed a contract, if any other had been designated.

Time for Which Reimbursement is Due.

Having had no opportunity to file a second brief before the submission of the case in this court, we avail ourselves of the present opportunity to point out some errors in the reply brief filed for the Government, having the most important bearing on the quantum of claimant's compensation.

At pages 9 and 10 of the brief the proposition is laid down that the finding of the court that "if claimant had been permitted to lay the crest blocks from that time on as the work progressed there would have resulted an additional protection which would have enabled him to work sixty days more than he did between that time and May 7, 1904, the date the first crest blocks were laid," is in effect a finding that claimant was delayed only sixty days; and reference is made to the facts that between August 18, 1903, and May 1,

1904, claimant worked seventy-three days, and that from May 1st he worked fifty-eight days. The argument is that it was impossible that the delay referred to caused the further delay of one hundred and forty-five days after that time. All these contentions are so beside the fact that but little explanation is needed.

From August 18th to May 6th is two hundred and sixty-two days, in which there were thirty-seven Sundays. This leaves two hundred and twenty-five possible working days; and the progress that was made by claimant in that time was one day in a trifle over every three days. From May 7 to September 17, 1904, is one hundred and thirty-three days, of which nineteen were Sundays, leaving one hundred and fourteen possible working days. It will not be denied that the last ten days of the time were spent in inspection and the details of closing the business. If these ten days and the ten days loss of time caused by the rejection of the crest blocks be deducted, we have ninety-four possible working days, of which claimant worked 58, or 1 in every 1.62 days; the percentage of time worked after the laying of the crest blocks was begun being 61.7. If this same rate of progress had been maintained from the beginning of the work claimant could have done 139 days' work before May 7th, a margin of 8 days over the 131 days actually required for the completion of the work.

A peculiar hardship to the contractor was that, through the slow progress he could make in the comparatively good weather of November to February, he was thrown over into the much rougher weather which, as the court knows judicially, occurs in that region between the vernal equinox, in March, and the summer solstice, in June. If the Assistant Engineer had given him his rights, to the end that he might work to good advantage before the period of storms, the work undoubtedly would have been completed before the time indicated in the findings.

We must confess that what we are here saying, like the argument to which we are replying, is, in the present state of the case, mere speculation. The inquiry as to the time when the project would have been completed is closed by the findings. The meaning of the findings is that, if Ripley had been permitted to do his work in the order to which he was entitled, the last stroke of work would have been done and Ripley would have been making a welcome journey away from that field of controversy and oppression by the 26th day of April, 1904. He was detained on the work then, by acts for which the Government was responsible, for 145 days subsequent to April 26, and for every one of those days the Government must reimburse him. The computation of time made by the Court of Claims which yields this result (while not giving to claimant all that we had sought in our argument) is for the purpose of the present hearing the correct computation.

The question before this court is the amount of compensation which claimant shall recover for these 145 days. The Court of Claims has awarded compensation for the days of actual work alone included in this period of delay, *and* applied to them a per diem proper to the full number of days, including Sundays and secular days lost through bad weather. To make the matter perfectly clear, it should have been said in the second paragraph of Finding XVII that the number of days which elapsed after the time when claimant, if allowed his rights, would have completed the work, was ~~145~~; for it is to that number of days the per diem of \$162.70, stated in the same finding, is to be applied.

Respectfully submitted.

W. H. ROBESON,
Attorney for Henry C. Ripley.

BENJ. CARTER,
F. CARTER POPE,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

HENRY C. RIPLEY, APPELLANT,	} No. 887.
v.	
THE UNITED STATES, APPELLEE.	

THE UNITED STATES, APPELLANT,	} No. 888.
v.	
HENRY C. RIPLEY, APPELLEE.	

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

The response of the Court of Claims to the mandate of this court, directing that additional findings be made, in no way affects the vitality of the argument heretofore presented in the briefs for the United States. It serves rather to strengthen the contention made in behalf of the Government, especially as to the proposition made on pages 33 and 34 of the original brief.

The finding of the court, to the effect that the inspector in charge *knew* "from the lapse of time" that large parts of the core had sufficiently settled and consolidated, adds nothing to the force of claimant's contention. There is nothing in this finding to

justify the inference that he had any conscious knowledge that the core had settled sufficiently. It makes clear, definite, and certain the truth of the suggestion we have already made (p. 32, original brief), that the court's finding the core had "manifestly" fully settled and consolidated, etc., is an inference drawn from the fact that in its judgment sufficient time had elapsed to bring about that condition. The supplemental finding of the court now made simply goes to the extent of expressing the further opinion that the inspector ought to have known this. It is submitted that whether the months of December, January, February, March, and April were sufficient time to permit the core to consolidate so as to justify the laying of crest blocks, is not a matter of such certainty as to enable the court to say that it must be patent to everyone. There is still nothing in the findings, taking into consideration the first and second paragraphs of the supplemental findings, to charge the inspector with having *known*, when he refused permission, that he was wrong. The finding that this refusal was "a gross mistake" might constitute constructive bad faith, if it were not for the nature of the "mistake" pointed out in the findings of the court. That "mistake" evidently consisted of his being unable to perceive that which appears patent to the court, to wit, that four or five months was sufficient time for the core to consolidate. Under some circumstances and conditions this might be true, but the ultimate fact to be determined is whether or not the core had "in the judgment of the U. S. agent in

charge" sufficiently settled and consolidated. The Court of Claims has not yet said positively and unequivocally that this core had as a matter of fact sufficiently consolidated to permit the laying of crest blocks at the time the inspector is said to have refused such permission. It has expressed its opinion that the lapse of time had been great enough or long enough to effect that result. That is a matter of opinion. It is the very question about which the contractor and inspector disagreed, the former insisting that enough time had elapsed to make certain the consolidation of the core, and the latter, the inspector, asserting that sufficient time had *not* elapsed. Now comes the Court of Claims and says in effect that in its opinion the contractor was right in the matter.

But if the refusal of the inspector to allow the crest blocks to be laid was such a gross mistake as necessarily to imply bad faith, why did not the contractor complain of it to the engineer in charge? The court finds in effect that there is no evidence to show that any protest or notice was ever made to anyone except the person in charge of the work of inspection, that is to say, *the inspector*.

The language of the court's first amendment to Finding VII was not responsive to the mandate of this court, but a later finding, made and certified since leave was granted to file this brief, corrects this defect. It is now answered that no protest or notice was ever made to the engineer in charge, or to the Chief of Engineers. The court, however, inserts, parenthetically, a statement of fact of which

this court would take judicial notice in any event, as to the location of the offices of said respective engineers. It is assumed that upon this statement the argument will be predicated by counsel for claimant that it was difficult, or inconvenient at least, for the contractor to protest to either of said officers. This argument is so fragile that it will break with handling. Furthermore, the court in its amended finding has given to the inspector who made the refusal involved a title which does not belong to him. The court says:

The assistant engineer in immediate charge of the work of inspection.

This does not comport with the original seventh finding (Transcript, p. 24), wherein the officer or person who refused permission to begin the laying of crest blocks is denominated the "*inspector* in charge." Why this change in title is made is inexplicable to us. It will no doubt be used by counsel for claimant in their contention that the person who refused such permission was the "U. S. agent in charge;" that he was an assistant engineer; that he had "immediate" charge of the inspection. There is not one word in any other part of the record before this court to justify the statement that the inspector whose refusal is said to have unreasonably delayed the work was anything more than an inspector. The facts before the court, as found in the seventh finding of fact, and in the amendments thereto, make it clear that the contractor made no protest or objection to any other person or official con-

nected with the United States Government, in so far as relates to the performance of this contract, except the "*inspector*" to whom he applied for permission to begin laying crest blocks.

The contract provided that one or more inspectors should be employed by the United States, who were to be furnished with facilities, etc., by the contractor. The fixing of the time when the core had sufficiently consolidated to permit the laying of crest blocks was in reality no part of the duty of one of these inspectors. That matter was to be determined by the "U. S. agent in charge." It was never submitted to him for decision. The claimant argued that matter with the inspector. He did not go to the United States agent in charge and ask permission to lay the crest blocks, nor did he go to said agent in charge and complain because of the action of the inspector in the premises. Whatever objecting or protesting he did was orally done and to the inspector alone. (Original Finding VII, p. 25; Supplemental Finding VII.)

The argument that the "U. S. agent in charge" was the employee who happened to be at the site of the work engaged in passing upon the condition of the work with respect to laying crest blocks and that there was no appeal from his decision is met by the contract itself.

The work shall be executed under the supervision of the *engineer officer in charge* and his duly authorized agents. The order of the work shall be subject to the approval of the

engineer officer in charge. The alignment of the work shall be prescribed by him and without his permission no work shall be conducted on Sundays and legal holidays. (Paragraph 35, Transcript, p. 4.)

The United States will employ one or more inspectors on each work. The contractor without additional compensation shall, when required, furnish every facility to such inspector and for the engineer officer in charge and his agents to supervise and inspect all work and materials and to send and receive official mail. * * * (Paragraph 38, Specifications, p. 4.)

The weighing will be done by an agent of the United States by the track scale, and all facilities for adjusting and testing it must be furnished by the contractor. It shall be located as close as practicable to the work or the point where the rock is transferred from railroad cars to barges, and all cost of weighing other than the services of the agent of the United States shall be borne by the contractor. Empty cars returned from the work shall be weighed whenever directed by the United States agent in charge. Any disagreement as to weights that may arise between the above-mentioned agent and the contractor shall be communicated in writing by the contractor to the *United States agent in charge* within 48 hours of the time at which the disputed weighing was done; otherwise the contractor's contention may be disregarded in preparing estimates. * * * Inspecting, measuring, and weighing of materials will be

done only between the hours of 7 a. m. and 4 p. m., unless other hours should be specifically authorized by the engineer officer in charge. (Paragraph 40, Transcript, p. 4.)

The language of the above-quoted provisions clearly shows that "engineer officer in charge" and "U. S. agent in charge" are used synonymously. Where there was dispute between the contractor and the inspector, the action of the latter was to be considered as final, unless protest was communicated in writing by the contractor to the "U. S. agent (U. S. engineer) in charge." Here we have a direct and unequivocal provision for appeal on disputed matters with relation to "weighing." It may be argued that this does not apply to the determination of the time when crest blocks might be laid, that being left to the judgment of the "U. S. agent in charge." But it does assist very much in finding out who is meant in this contract by the term or title "U. S. agent in charge." The inspector who refused to allow the contractor to begin laying crest blocks at the time requested was on a par with the inspector who was to weigh the stone. He was no more the "U. S. agent *in charge*" than was the weighing inspector or "agent."

Looking to the whole contract and giving it a reasonable interpretation, it seems to us there is only one person who can be the "U. S. agent in charge" and that person must be the engineer officer under whose supervision the work is to be done and under whose direction the inspectors appointed by the Gov-

ernment are to work; whose decision "as to quality and quantity shall be final"; the man who was authorized to annul the contract under certain conditions; the man who was to determine the cost of board and lodging when furnished by the contractor, also the price of such boats, labor, and materials as might be required of the contractor to assist the United States in surveying, inspecting, etc.; the man to whom the contractor was obliged to furnish facilities for inspectors and "for the engineer officer in charge and his agents." That person was in the first instance Capt. Riche, between whom and the claimant the contract was made and who remained in charge for a time, and Capt. Jadwin, who at the time of the controversy involved in this lawsuit occupied that position or station. His office was in Galveston, the headquarters of the district. He was the "forum," where the contractor could have gone and presented his grievances. Having failed to do so, we submit that the principle stated by the Court of Claims in the case of Bray, trustee, etc., cited on page 34 of the original brief for the United States, is applicable here, and as a consequence, the judgment of the Court of Claims should be reversed.

JOHN Q. THOMPSON,

Assistant Attorney General.

PHILIP M. ASH FORD,

Attorney.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 498.

HENRY C. RIPLEY, APPELLANT,

VS.

THE UNITED STATES.

No. 499.

THE UNITED STATES, APPELLANT,

VS.

HENRY C. RIPLEY.

**RESPONSE OF COURT OF CLAIMS TO ORDER OF DECEMBER 4, 1911,
REMANDING CAUSE FOR ADDITIONAL FINDINGS OF FACT.**

FILED DECEMBER 23, 1911.

(22508 AND 22509)



Supreme Court of the United States.

HENRY C. RIPLEY, APPELLANT,	}	No. 498.
vs.		
THE UNITED STATES.		

THE UNITED STATES, APPELLANT,	}	No. 499.
vs.		
HENRY C. RIPLEY.		

In response to the order of the Supreme Court of December 4, 1911, remanding the above-entitled cause for additional findings on the questions—

“First. Whether, when the claimant was laying the slope stones and during the months of December, 1903, and January, February, March, and April, 1904, as recited in Finding VII, the inspector in charge knew ‘that large parts of the work done by the claimant had fully settled and consolidated.’

“Second. Whether in the various refusals to permit the laying of crest blocks stated in Finding VII the inspector in charge acted in good faith.

“Third. Whether at any time the claimant notified the Engineer officer in charge or the Chief of Engineers that the inspector in charge wrongfully refused to permit the laying of the crest blocks, and if such notice was given whether it was oral or written, when the notice or notices were given, and what action, if any, was taken by such superior officer”—

The court makes additional findings as follows:

(1) When denying permission to the claimant to lay the crest blocks, as stated in Finding VII, the assistant engineer, who was an experienced officer of the Government in such work and who was acting as inspector in immediate charge of the work, knew that large parts of the core theretofore completed by the claimant had fully settled and consolidated and were ready for the crest blocks to be laid thereon.

(2) The refusal of said assistant engineer as inspector in immediate charge of the work to allow crest blocks to be laid when he knew that parts of the core had settled and consolidated, as aforesaid, was gross error and an act of bad faith on his part.

(3) There was no protest made to the engineer in charge, whose office was in Galveston, or to the Chief of Engineers, whose office was

in Washington, respecting the refusal of said assistant engineer to permit the laying of crest blocks as aforesaid. The claimant made frequent complaints to said assistant engineer about the delays so caused by his refusal to permit the laying of crest blocks.

The claimant visited the office of the engineer in charge at Galveston about once a month, and while there complained generally that said assistant engineer as inspector in immediate charge of the work was too strict with him in construing the specifications and contract. No appeal, either written or otherwise, was taken or asked by the claimant to either the engineer in charge or to the Chief of Engineers because of said refusal to permit the laying of crest blocks.

BY THE COURT.

A true copy:

Test this 22d day of December, 1911.

[SEAL.]

JOHN RANDOLPH,

Asst. Clerk Court of Claims.

Attest:

STANTON J. PEELLE,

Cf. Justice.

(Indorsement on cover:) File Nos. 22508 and 22509. Supreme Court U. S. October Term, 1911. Term Nos., 498 and 499. Henry C. Ripley, appellant, *vs.* The United States. The United States, appellant, *vs.* Henry C. Ripley. Response of Court of Claims to order of December 4th, 1911. Filed December 23, 1911.

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Chicago, Ill.

OCTOBER TERM, 1910.

887

HENRY C. RIPLEY, *Appellant*,
v/s.
THE UNITED STATES.

888 THE UNITED STATES, *Appellant,*
v's.
HENRY C. RIPLEY.

MOTION OF HENRY C. RIPLEY FOR SECOND RE-
MAND TO THE COURT OF CLAIMS, WITH EVI-
DENCE AND BRIEF.

Comes Henry C. Ripley, appellant in appeal No. 887 and appellee in appeal No. 888, by his attorney and shows to the court that, by mandate of this court signed on the twenty-fourth day of April, 1911, directing that additional findings of fact be made, the Court of Claims, in the matter of permission sought for laying of crest blocks, forming the highest stratum of the jetty in question, was restricted to the fact of notice addressed by him (Henry C. Ripley) to the engineer officer in charge, or to the Chief of Engineers, of the inspector's denial of such permission, and, having no authority to find, said court has not found any facts from which this court can determine whether it was

incumbent on the contractor to send such notice to the engineer officer in charge or to the Chief of Engineers or why the same was not sent; that in fact no such notice was made because the contract, and the plan pursued in the work did not require or provide for the same, and because the engineer officer or his assistants at Galveston, Texas, were repeatedly informed, by communications from the chief inspector and by conversations with said Henry C. Ripley himself, of said action of the chief inspector and invariably refused to correct or interfere with the same; and that in fact the decisions of said chief inspector in said matter could not have been subject to review and correction without delaying the work and subjecting the contractor and the structure itself to serious injury against which it was the purpose of the contract to guard. Wherefore said Henry C. Ripley moves that said submission of said appeals be set aside and that, if this court be of opinion, on the record now before it, that he was obliged to make such notice to said engineer officer in charge or the Chief of Engineers, the cause will be again remanded to the Court of Claims with directions to find and report to this court, from the evidence already on file and any additional evidence that may be submitted, the facts pertinent to the following questions:

Whether the contractor was obliged or was authorized to appeal from decisions of the Assistant Engineer in charge at the jetty regarding the readiness of the structure to receive the crest blocks.

Whether in the plan of the work, laid out after the contract was signed and approved, there was any provision for review of such decisions of the Assistant Engineer.

At what times, if any, there was present at the district engineer's office in Galveston, in the months of October, November and December, 1903, and January, March and April, 1904, any officer of the United States exercising the

right, on notice, to review and overrule such decisions of the Assistant Engineer in charge at the jetty.

Whether the Assistant Engineer in charge at the jetty himself constantly communicated to said district office at Galveston the contractor's objections to the delay of the laying of the crest blocks.

Whether said Henry C. Ripley himself, in oral communication with said engineer officer or other person in charge at said office in Galveston, constantly and promptly spoke of said action of the Assistant Engineer at the jetty regarding the laying of the crest blocks and of his own objections thereto and whether, after said communications, said action was reviewed and corrected by said office or was allowed to stand uncorrected.

With and in support of this motion there is filed an affidavit of said Henry C. Ripley himself, one other affidavit and a certified copy of the printed evidence on which the cause was heard in the Court of Claims.

WM. H. ROBESON,
Attorney for Henry C. Ripley.

AFFIDAVIT OF HENRY C. RIPLEY.

Consulate General of the United States of America at Rio de Janeiro, Brazil, ss.

Henry C. Ripley, being first sworn according to law, doth depose and say:

I am at present residing in Rio de Janeiro, Brazil, but during the years 1903 and 1904 I was a contractor with the Government for the construction of the jetty at Aransas Pass, Texas, and am the claimant in the Court of Claims, Case No. 28555, Henry C. Ripley vs. the United States.

That the actual work on the jetty was commenced August 18th, 1903, and was finished September 17th, 1904, a total

period of exactly thirteen months. That during this period Colonel Edgar Jadwin, the engineer officer in charge, was absent from his station at Galveston about seven months, approximately as follows: During a part of October, during November and December, 1903, January and part of February and during June, July and part of August, 1904. That during his absence from his station he was reputed to have been mostly in New York having his eyes treated. That to my recollection Colonel Jadwin only visited the work once after operations had commenced and then I did not go with him on the work because he came without notice to me and went upon the work without my knowledge of the fact until afterwards.

That the placing of the large riprap for the protection of the core of the work was commenced in the month of October, 1903, at which time the work had consolidated so as to permit the placing of the crest blocks, and I so expressed myself to the United States Assistant Engineer in charge and requested permission to order them from the quarry; but the Assistant Engineer refused, assigning as a reason for refusal, that the work was not sufficiently consolidated for the crest blocks and saying that he would give notice in ample time to have the crest blocks on the ground by the time the work was ready for them. This United States Assistant Engineer was the chief inspector on the work and his office was at the site of the work which was subject to his visual examination from day to day. He was bound to know that the core had sufficiently consolidated to permit the laying of the crest blocks, because it was impossible for him to know anything else.

The survey of the work made by the Engineering Department of the United States, and dated November 2d, 1903, shows that 550 feet of the core had been finished up to that time, that is to say that it had been built up to the height of mean low tide and was ready to be leveled off and bedded for the crest blocks, and it was about this time that the question as to the time for placing the crest blocks was brought by me to the attention of the Galveston office (during Colonel Jadwin's absence) which sustained the action of the assistant, or inspecting engineer, in denying me the per-

mission to place them. Thereafter I made frequent requests of the Assistant Engineer for permission to lay these crest blocks, but his permission was always denied, the said assistant always saying either that the core had not sufficiently consolidated or that he would let me know when he was ready for them.

Again in February, 1904, when the use of granite riprap first commenced or early in March I brought this matter to the attention of Colonel Jadwin, who had just returned from an absence of about four months, and asked him personally for permission to commence the placing of the crest blocks, but he sustained the action of the inspecting engineer in refusing me this permission. I made these requests verbally, and while the exact dates cannot be recalled at this time, the circumstances are well remembered and the conditions of the work at these times make it possible to fix approximately the dates above given. Mr. Hartrick was never present at a conference which I had with Colonel Jadwin. Whenever he was called in by Colonel Jadwin it was for the purpose of answering some specific question, and as soon as this was answered he retired.

The Assistant Engineer made frequent reports to the Galveston office, and I always supposed, and do now believe, that he communicated my repeated requests, for permission to lay the crest blocks, to the Galveston office. I did not take any formal written appeal from the Assistant Engineer to the district engineer, but on my visits at Galveston I reported to Colonel Jadwin the rulings and actions of the Assistant Engineer regarding the laying of the crest blocks and made complaint against them and demonstrated to Colonel Jadwin that I was correct in my position; but Colonel Jadwin instantly sustained the action of the Assistant Engineer.

Witness my hand this 16th day of August, 1911.

(Signed) HENRY C. RIPLEY.

Witness to signature of Henry C. Ripley:

Y. A. CAVALLERO.

C. V. SONTROY.

Certificate of Acknowledgment of Execution of Document.

Brazil, Rio de Janeiro, Consulate General of the United States, ss.

I, Julius G. Lay, Consul General of the United States of America at Rio de Janeiro, Brazil, duly commissioned and qualified, do hereby certify that on this 16th day of August, 1911, before me personally appeared Henry C. Ripley to me personally known, and known to me to be the individual described in, whose name is subscribed to, and who executed the foregoing instrument, and being informed by me of the contents of said instrument duly acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and official seal the day and year last above written.

JULIUS G. LAY,

Consul General of the United States of America.

AFFIDAVIT OF LEWIS M. HAUPT.

State of Pennsylvania, County of Philadelphia, ss.

Before me, a Notary Public in and for said State and county, appeared this day Lewis M. Haupt, who, being by me sworn, made oath and said that he is the same person who, in the case of Henry C. Ripley vs. The United States, No. 28555, in the Court of Claims of the United States, is mentioned in the testimony and findings of fact as having aided in preparing the specifications under which the contract of said Henry C. Ripley for part construction of a jetty of the Harbor of Aransas Pass, Texas, was awarded; that affiant has continuously since 1903 had business relations with said Henry C. Ripley and has been in constant correspondence with him during said period; that for some five years past said Henry C. Ripley has, in the practice of his profession as a civil engineer, been employed on the construction of an extensive system of harbors in Brazil and has been at some times in the city of Rio de Janeiro, but at other times in various provincial parts of Brazil; that

during said period an average of three months has been required for the transmission between affiant and said Henry C. Ripley in Brazil of a letter and reply; that Henry C. Ripley, during said period, has been in the United States but twice, the last of which visits was in the year 1910. Affiant further says that, when he was assisting in the preparation of said specifications and was considering of the method by which the readiness of the core of the jetty to receive the crest blocks was to be determined and consenting to paragraph 61 of said specifications, he understood and accepted the words "United States agent in charge" as referring to the person who should be stationed at the site of the work as chief inspector and should have the jetty constantly under his visual observation, and to no other person, and that affiant understood that there was not to be any appeal, under said specifications, from such decisions of said chief inspector to any engineer or other officer of the United States; that the only method by which said work could be protected against delays, injurious to the contractor and to the work itself, was by such instant and final decisions regarding the readiness of the core, to be made by the inspector present on the work, and that, on any stipulation or understanding that said question was to be subject to decisions of any engineer, officer or agent of the United States other than said chief inspector, affiant would have hesitated to assent to said specifications. Affiant further says that, from numerous conversations with said Henry C. Ripley both before and after said specifications were signed, he knows that said Henry C. Ripley's understanding of said paragraph 61 in said particular was the same as affiant's, above stated. Affiant further states that, although he was present on said improvement but a few times during the work of said Henry C. Ripley on the same, he knows that said Henry C. Ripley, before laying any crest blocks on the jetty, made numerous but futile applications to the agent of the United States in charge at the work, viz., F. Oppikofer, for permission to lay said blocks *Signed Henry M. Haupt*

Subscribed and sworn to before me this 19th day of September, 1911.

J. K. LEE SMITH,
Notary Public.

**EXTRACTS FROM PRINTED EVIDENCE IN COURT
OF CLAIMS.**

Form of Correspondence between Engineer's Office at Galveston and F. Oppikofer.

February 18, 1904.

MR. F. OPPIKOFER,
U. S. Assistant Engineer, Tarpon, Texas.

* * *

[Signed] EDGAR JADWIN,
Captain, Corps of Engineers, U. S. A.

Tarpon, Texas, February 23, 1904.

CAPTAIN EDGAR JADWIN,
Corps of Engineers, U. S. A.

* * *

[Signed] F. OPPIKOFER,
Asst. Engineer.

June 23, 1904.

MR. F. OPPIKOFER,
Assistant Engineer, Tarpon, Texas.

* * *

[Signed] E. M.¹ HARTRICK,
Asst. Engineer.

(Printed Evidence, pp. 40, 41.)

Testimony of Henry C. Ripley.

Question. Did or did not Captain Jadwin direct and require you to construct the work in the way you describe?

Answer. I might say in explanation that Captain Jadwin was away a large part of the time during this contract and that an assistant by the name of Captain Hoffman was there, although he did not have authority to pay for any work. He had some authority, and was really in charge, but at the same time he would not take any responsibility

without first submitting the matter to Captain Jadwin, who was the responsible officer in charge. The dealings, of course, that I had were mostly with the inspector immediately on the work who had the authority to direct my work and to keep track of the quantity and the manner in which it was placed. This was F. Oppikofer, Assistant Engineer, and immediately in charge of the work of construction. My instructions to do the work in the way mentioned were given by him—Mr. Oppikofer. I received all my instructions in regard to the actual work on the ground from Mr. Oppikofer.

(Printed Evidence, p. 48.)

Testimony of Herbert S. Ripley.

Question. Why didn't he begin to lay the cap blocks, then, after the first month's work?

Answer. Well, the United States, through their agent, Oppikofer, told him not to. I don't know but what the office gave instructions to that effect. My father would go over and consult with the Galveston office once a month, at least.

(Printed Evidence, p. 125.)

Question. What answer did you hear Mr. Oppikofer make to your father on this point?

Answer. The only answer I heard him make was he was not ready for them yet, and he would officially inform him when he was ready.

Question. Did he actually have the cap blocks ready for use when he first proposed to put them on?

Answer. I don't know as to that. He had to order them and told Mr. Oppikofer he would have to order them a month ahead of the time he needed them because it takes some time to get them out.

(Printed Evidence, p. 126.)

* * *

Answer. If they had gotten out all those blocks and kept them until the last two or three months before using them,

the quarry would have been so jammed with them that they couldn't have carried the other work on. * * * They couldn't store immense stone like that.

* * *

Question. Now, what did Mr. Oppikofer assign as his reason for not permitting you to put on the crest blocks when you desired to do so?

Answer. The only reason I ever heard him say, he would tell us when to order the crest block. He said, "Don't order the crest block; I will tell you when to order them."

(Printed Evidence, p. 132.)

Testimony of Robert P. Clark.

Question. What was the particular occasion, if any, of your knowing about that work and about the situation and conditions, if any?

Answer. From having done the previous contract and having figured also on that contract. The previous contract I refer to was for improvement of that pass. Our firm of Clark & Co. did this previous work and of course I frequently visited it. Even before this we had worked on two improvements for the Government at the same pass, one in 1888, being the revetting of the end of St. Joe Island, and the second was not done for the Government but for the Aransas Pass Harbor Company on the breakwater constructed on the Haupt plan, the same one on which Mr. Ripley afterwards had his contract.

Question. When was it you were engaged on the last of these three improvements you speak of at that place?

Answer. 1901 and 1902, I think.

(Printed Evidence, p. 86.)

Question. What other Government work have you done beside at Aransas Pass?

Answer. Our firm, Clark & Co., did the Government work at the mouth of the Brazos River, at Galveston, Sabine Pass, and Calcasieu Pass.

(Printed Evidence, p. 89.)

Question. Now, Mr. Clark, in constructing this jetty it would be necessary and proper from an engineer's standpoint to allow the core to settle somewhat before the crest blocks were put on, wouldn't it?

Answer. Well, I should not think it would be necessary to allow it any more settlement than what it would naturally get from the time of discharging one barge until the time of discharging another. We have so much rough sea down there it gets in place pretty quick—washes into place.

(Printed Evidence, p. 93.)

Testimony of E. M. Hartrick.

Question. Did you give any instructions to Mr. Oppikofer?

Answer. We gave general instructions to carry on the work; nothing particular in starting.

Question. In what particular was it necessary to instruct him?

Answer. None. He was an old employee of the Government and understood his duties pretty well.

(Printed Evidence, p. 142.)

Question. Now, prior to the conversation had with Mr. Ripley in which you say he referred to the fact that Mr. Oppikofer was too strict with him, had you personally heard any complaint about the execution of this contract from Mr. Ripley or his agents or employees?

Answer. No. I heard nothing—unless you would say that of Mr. Oppikofer when he would send memorandum now and again that Mr. Ripley was kicking as usual.

* * *

Answer. * * * Ripley had continued to complain about these things every time he came, and on the 19th of August I went down and stayed until the 23d.

* * *

Question. What stage of progress was the work in at the time you went there?

Answer. Roughly I should say nine-tenths done.

Question. Were they laying any crest blocks while you were there?

Answer. They did.

(Printed Evidence, pp. 143, 144.)

Testimony of Edgar Jadwin.

Answer. * * * The instructions to the assistant engineer were prepared and submitted to my predecessor and myself during the time he was turning over the district.

* * *

(Witness produces copy of instructions, which are attached and marked "Exhibit 6.")

[Letter.]

U. S. Engineer Office,
GALVESTON, TEXAS, June 23, 1903.

Mr. F. Oppikofer,

Assistant Engineer, City.

Sir: On the 30th day of June, 1903, you will leave Galveston for Aransas Pass, having first furnished yourself with all papers, maps, charts, and information necessary for carrying on the work according to contract and specifications.

Former instructions will remain in force until further orders. Mr. C. J. Howard will report to you as recorder on July 1, at Aransas Pass. You will, to the best of your ability, instruct him for the position of junior engineer.

* * * You will also have your recorder make a complete record of all landmarks, beacons, etc., for the laying out of north jetty and old Government jetty. Have the notes carefully plotted and a tracing sent to head office.

* * * Have him compile data and plot same, so that the chart or map will show the location of all work laid out by you, with the reference points governing the same,

and such other information as will enable an intelligent overseer to supervise the work in the absence of the Assistant Engineer. * * *

[Signed] C. S. RICHÉ,
Capt. Corps of Engrs.

(Printed Evidence, pp. 180, 155, 156.)

Answer. * * * He (Ripley) wrote the letter and I forwarded it recommending approval.
* * *

[Letter.]

Rockport, Texas, May 22, 1904.

Capt. Edgar Jadwin,

Corps of Engineers, U. S. A., Galveston, Texas.

Captain: I have just returned from the quarry at Granite Mountain, where I have been to consult with Mr. Steinmetz, of the firm of J. M. O'Rourke & Co., in regard to the large granite blocks to be used in the construction of the jetty at Aransas Pass.

It is found to be very difficult, if not impossible, to get out these blocks of the exact dimensions required by the specifications without resorting to the use of stonecutters. I know that it was not contemplated that this should be done when the specifications were prepared. * * *

[Signed] H. C. RIPLEY.

(Printed Evidence, pp. 182, 143, 150.)

Question. Did you have any discussion or conversation with Mr. Ripley or his representatives with reference to the laying of the crest blocks or capstones?

Answer. I don't recollect any prior to this referred to, which took place in the spring of 1904, probably April or May.

(Printed Evidence, p. 183.)

Question. You were absent from your office a large part of the time during which this Ripley work was going on?

Answer. Yes, sir.

Question. You were in New York, I believe?

Answer. Yes, sir.

* * *

Question. Largely disabled from attending to business, were you not?

Answer. Yes; there were certain times that I could not write—perhaps a day or two days at a time after an operation I would be in a dark room. Then I was around until I had another operation.

Question. How many of these operations did you undergo?

Answer. Eighteen—nine the first time and nine the second.

(Printed Evidence, pp. 186, 187.)

Question. The Assistant Engineer is not an inspector?

Answer. He was our chief inspector, using the word one way.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

Nos. 887 and 888.HENRY C. RIPLEY, *Appellant*,

887

vs.

THE UNITED STATES.

THE UNITED STATES, *Appellant*,

888

vs.

HENRY C. RIPLEY.

APPEALS FROM THE COURT OF CLAIMS.

**BRIEF FOR HENRY C. RIPLEY ON MOTION FOR
SECOND REMAND TO THE COURT OF CLAIMS.**

The Court of Claims in its main findings of fact took no account of Henry C. Ripley's making, or failing to make, appeal to the district engineer at Galveston or to the Chief of Engineers against the chief inspector's denial of the right to lay the crest blocks on the jetty during some six months in 1903 and 1904. The more reasonable assumption is that from the entire specifications (parts of which only are before this court) and the plan on which the work was laid out, the court concluded that there was no obligation on occasion to take such an appeal. For all that this court

knows, however, there may be other reasons, *e. g.*, that the Galveston office was constantly informed in other ways of what was going on at Aransas Pass harbor, and refused to override the inspector's decisions, or that the engineer officer himself put it out of Ripley's power to seek redress by a formal appeal.

The remand was made by this court with the evident purpose of deciding the case before the adjournment for the term; the Court of Claims being enjoined to make its return "with all convenient speed." It was not deemed proper on the part of Henry C. Ripley that any motion should be made here, in that state of the case, for any amplification of the record beyond that for which the court had called. In our brief on the added findings, however (pages 4 and 6), it was suggested that, if this court should take the view that there was a *prima facie* necessity of a formal protest by Ripley against the decisions of the chief inspector, the ends of justice would require that the court be informed of the reasons, if any, why no such protest was made. The present motion merely puts that proposition in form.

There have been filed with the motion an affidavit of Ripley himself, an affidavit of Lewis M. Haupt and a certified copy of the evidence in the Court of Claims.

Under the heads of three main propositions of fact we proceed now to state, with brief comments, the evidence on which the motion rests.

The Inspecting Engineer Was the Final Judge of the Condition of the Core.

The official title of F. Oppikofer, whose station was at the site of the work and who has often been referred to in this record as "chief inspector" was "Assistant Engineer." (Official letters, p. 8, *sup.*) Ripley's dealings were

chiefly with this officer; it was he who gave instructions for the work. (pp. 8 and 9, *sup.*)

Under paragraph 6 of the specifications (Transcript, p. 6) it was the "U. S. agent in charge" who should determine when the core or mound was sufficiently consolidated to receive the crest blocks.

Paragraphs 40, 41 and 42 of the specifications (Transcript, p. 5) contain the same phrase, "U. S. agent in charge," and illustrate the relative functions of the officer so named and the district engineer. The former is designated as the judge of the correctness of the method of weighing and of the proper placing of the materials and the latter as the judge of the necessity of the contractor's furnishing labor and appliances to the Government for its own use in making surveys of this work and other localities thereabouts or of his boarding the Government's employees. These latter matters did not require quick decision; the former, like the subject of paragraph 61, did require quick decision.

The affidavit of Lewis M. Haupt makes it clear that the man in charge at the work, and none other, was to judge of the condition of the core. Mr. Haupt had been consulting engineer for the Aransas Pass Harbor Company on this same project. On the invitation of Captain Riché, then in charge at Galveston, and at the request of Ripley, he had assisted in preparing the specifications. He deposes that the words "U. S. agent in charge" in paragraph 61 were understood by himself and Ripley as referring to the chief inspector, who was to be constantly present on the work; also that they did not understand that the decisions of this functionary were to be subject to review at Galveston. Mr. Haupt also explains the necessity of prompt decision in all such matters by some authorized person on the ground.

Oppikofer himself in all his dealings with Ripley maintained the attitude that it was his function and his alone

to decide about the capping. "*He* was not ready"; *he* would let Ripley know when "*he* was ready"—"*he* would tell us when to order the crest blocks." (Printed Evidence, pp. 9 and 10, *sup.* Italics ours.)

The Government's attorneys in their "supplemental" brief, treating of the additional findings, labor to draw a distinction between the "U. S. agent in charge" and the functionary in local control at the jetty; and they endeavor to make it appear that the phrase which we quote referred to the engineer in charge at the Galveston office, the district engineer. They are conspicuously unfortunate in their criticism (p. 4) of the Court of Claims' phrase "the Assistant Engineer in immediate charge of the work of inspection." As we have shown "Assistant Engineer" was the exact official name of Oppikofer.

Below is Captain Jadwin's testimony on this identical point (Printed evidence, p. 14, *sup.*):

Question. The Assistant Engineer is not an inspector?

Answer. He was our chief inspector, using the word one way.

Counsel do not venture to quote paragraphs 41, 42 and 61 of the specifications, the last of which governed the laying of the crest blocks; but paragraphs 35, 38 and 40, which they quote, do not aid their argument. In those paragraphs the phrase "engineer officer in charge" is used with reference to those larger matters of policy which called for decision at Galveston, viz., the general superintendence of the work of all agents, the fixing of working hours, etc. The phrase "U. S. agent in charge" is employed with reference to disagreements as to the weight of stones for immediate use; the stones having been weighed by one of the two inspectors subordinate to Oppikofer. The same phrase

is employed, we repeat, with reference to the weighing of empty cars constantly returned for immediate reloading. It is inconceivable that a car was to stand idle, say from three days to a week, while the Galveston office was determining, on facts communicated from the jetty, whether there was need of weighing it.

The matters committed by paragraphs 35, 38 and 42 of the specifications to the discretion of the "engineer officer" were those on which there would be sufficient leisure for consideration and action at Galveston, concerning chiefly the life and duration of the contract and the computation of the contractor's pay. Moreover they called for a broader discretion than that of the assistant who merely supervised the daily operations. We do not find the words "U. S. agent in charge" used anywhere with reference to these larger questions. They are used with reference to questions not expected to be so important, which would arise day by day at the jetty, and on which no superior officer would be competent to give a prompt decision.

There is always an "engineer officer" in charge on Government improvements. Ordinarily he is the district engineer, who has drawn the specifications and has awarded the contract. It would be strange indeed if in any matter requiring action of this chief officer a contract should use the words "United States agent." That term could only be used with reference to some subordinate functionary who was to be associated with the particular project, and whose title could not be foretold. In this instance the "United States agent" happened to bear the title of Assistant Engineer; he had under his command, beside at least two inspectors, an "intelligent overseer" or "junior engineer." (Printed evidence, p. 13, *sup.*); as we have seen he had some large responsibilities; but the record makes it impossible to confound him with his chief, "the engineer officer in charge."

It was reasonable to give Oppikofer this responsibility because he was an "old employee of the Government" (Testimony of E. M. Hartrick, p. 11, *sup.*).

May not this clear distinction between United States agent in charge (Oppikofer) and the district engineer, and the lack of jurisdiction of the latter in the matter here under discussion have been the sole reason of the Galveston office in its refusals to give Ripley relief?

In the brief filed for the United States on the main case (p. 6) there is a suggestion that "physical examination" was the only proper basis for a conclusion that the core was consolidated. We cordially assent to the proposition that physical examination was a proper basis for testimony on this point; and the fact is relevant to two aspects of the case: (1) Oppikofer was making, was charged to make, this physical examination day by day. (2) It would not be possible for the district engineer at Galveston to make these examinations day by day, and for this reason the specifications did not provide for the exercise of any judgment by him.

It Was not Feasible to Make Any Formal Protest to the District Engineer.

It appears from statements of Ripley, both in his deposition and in the present affidavit, and in those of Captain Jadwin that the latter was at his office a very small part of the period in which Ripley was seeking permission to lay the crest blocks. Ripley says Jadwin was absent, in New York, during October and November, 1903, during January and a part of February, and during June, July and a part of August, 1904. Jadwin testifies that he was in New York a large part of the time and had eighteen operations performed on his eyes. (Printed evidence, pp. 4, 8, 13 and 14, *sup.*)

Ripley also testifies that Captain Hoffman, an Assistant

Engineer, was acting in Jadwin's stead to some extent at the Galveston office during his absence, but would not take any responsibility without first submitting the matter to Jadwin (Ib.). If the contract had really stipulated that Ripley should appeal in this particular matter from the inspecting engineer to the district engineer, he surely would have been discharged from that requirement by the plan pursued by Captain Jadwin, of putting himself out of reach without leaving a vice-gerent at his office.

The more rational view to take of these facts, however, is that they merely corroborate the other evidence that Oppikofer's rulings about the condition of the core were not to be subject to review.

The Galveston Office Was Constantly Advised of the Inspecting Engineer's Action and Would not Overrule Him.

In his affidavit Ripley states, in effect, that in November, 1903, Oppikofer's action regarding the laying of the crest blocks and his own objection thereto was brought by him to the attention of the Galveston office; also that in February, 1904, at a personal interview with Captain Jadwin, he brought the matter up again.

The affidavit also shows that Oppikofer made frequent reports to the Galveston office, and, as Ripley believes, mentioned the repeated requests for permission to lay the crest blocks.

Captain Jadwin also testifies of the interview to which Ripley refers but his recollection is that the time was "in the spring of 1904, probably April or May."

The first crest blocks were laid on May 7, 1904 (Transcript, p. 25). Permission for this particular work must have been given by Oppikofer something like a month before; that time was needed to get out these large blocks at

the quarry, two hundred miles away, and transport them by rail to Rockport (Testimony of Herbert S. Ripley, pp. 9 and 10, *sup.*). Ripley did have an interview with Captain Jadwin on May 22d; but the subject of that was the method of testing the crest blocks which were then coming in. The readiness of the core to receive the blocks was then a closed issue—it was already receiving them; and Ripley certainly was not then making an idle protest against Oppikofer's earlier forbidding of that work.

The only reasonable theory of Captain Jadwin's testimony is that his memory failed for the moment with respect to the time of this conversation; he confounded this with one of the other interviews, occurring on Ripley's periodical visits, on other subjects. This mistake is natural enough with reference to a locality where February is so much like the spring that the planting of staple crops has commenced and early vegetables have matured. Ripley's affidavit is the more trustworthy because it is the result of investigation subsequent to the trial.

Neither of the two chief witnesses for the Government proves infallible, though they might have found a record for everything on which they were interrogated. The following is from Mr. Hartrick's deposition:

Question. Did you give any instructions to Mr. Oppikofer?

"Answer. We gave general instructions to carry on the work; nothing particular in starting.

Question. In what particular was it necessary to instruct him?

Answer. None.

(Printed Evidence, p. 11, *sup.*)

Captain Jadwin on the other hand read into his deposition a letter of instructions given to Oppikofer by Captain Riché. This bears date of June 23, 1903. It contains particular di-

rections for the installation of the work, including instructions to be given to an embryo "junior engineer." (Printed Evidence, pp. 12 and 13, *sup.*)

Herbert Ripley testifies that his father "would go over and consult with the Galveston office once a month at least." (Printed Evidence, p. 9, *sup.*)

Mr. Hartrick testifies of frequent reports made by Oppikofer to the Galveston office that Ripley was "kicking"; this, before the dispute arose about the acceptability of the crest blocks. In speaking of the events of the summer following this witness says that Ripley "had continued" to complain. The one serious ground for the earlier complaints ("kicking as usual"), was the denial of the right to lay the crest blocks. It is incredible that this matter, with Ripley's objections to Oppikofer's action, was not communicated by Oppikofer in these reports, covering six or seven months.

Recapitulation.

For the purpose of this motion we are required to show merely a probable case calling for the additional findings of fact proposed. We submit that the evidence now offered creates a very high probability that the Court of Claims, on full proof, would make affirmative findings on the first, second, fourth and fifth questions of fact set out in the motion and on the third proposition would find that there was *not* present at the Galveston office in October, November and December, 1903, or in January, March and April, 1904, any officer of the United States exercising the authority in question.

The affidavit of Lewis M. Haupt states the reason why the present case could not be made in the little time remaining at the last term of this court, viz., that Ripley was still in South America and no affidavit or advices could have been obtained from him.

ERRORS IN ARGUMENTS SUBMITTED FOR THE GOVERNMENT.

We embrace this, the first opportunity we have had, to correct some errors which appear in the last briefs filed for the Government, viz., the supplemental brief, dealing with the additional findings made by the Court of Claims, and the reply brief on the main case.

The Court of Claims has not found, as counsel argue, at page 2 of the supplemental brief, that Oppikofer's mistake consisted in his "being unable to perceive that which appears patent to the court, to wit, that four or five months was sufficient time for the core to consolidate." The finding is that he did perceive this. "Knew" is the word used by the court. It would be of no consequence if he had no reason to know this other than the lapse of time. In reality the court has found that "it was manifest" that the core had fully consolidated. What Oppikofer was denying was a thing plain to be seen of all men. The lapse of time signified the same thing that his eyes, whenever he chose to use them, determined beyond any possibility of cavil.

In the reply brief (page 6) counsel assert by an interlineation with pen that only "Mr. Clark who did *some work* on the jetty for the Harbor Co." in addition to Ripley, his son and Mr. Haupt, have testified regarding the condition of the core. (*Italics ours.*) When evidence, instead of findings is cited, it should be cited in a way that does not take away its value. We therefore call the Court's attention to the actual testimony sufficient to identify the witness Clark and to show his means of knowledge. The statement as to the need of time for the jetty to consolidate is:

"Well, I should not think it would be necessary to allow it any more settlement than what it would naturally get from the time of discharging one barge until the time of discharging another. We have so much rough sea down there it gets in place pretty quick—washes into place." (Printed Evidence, p. 11, *sup.*)

Surely this testimony justifies our statement, at page 6 of our reply brief on the main case (grounded more particularly on the testimony, less favorable to Ripley, of Ripley himself and Mr. Haupt), that one-fifth of the time required by Oppikofer was all that could be needed for consolidation of the core.

To qualify himself to give an opinion in this matter, Mr. Clark testifies (p. 10, *sup.*) that his firm had performed one previous contract (for the Aransas Pass Harbor Company) on this identical jetty and performed one contract for the United States following on Ripley's work.

Counsel's statement at page 4 of their reply brief that the Court of Claims does not find that permission to lay the crest blocks was refused about two months after the 18th of August, 1903, is hypercritical. The court finds that "commencing in October, 1903, when about three hundred feet of the core had been built up to the required elevation Ripley was permitted to lay some slope stones" and the context of the findings, as well as the argument in the former briefs, shows that this permission to lay some slope stones was a mere concession to Ripley after he was forbidden to lay the crest blocks. If there could be any doubt on this point, that would be cleared away by Ripley's affidavit stating that the matter was brought to the attention of the Galveston office, at the latest, in November, "about" November 2d, to be exact.

We do not really, as counsel state at page 7 of their reply brief, complain that in computing the *per diem* of Ripley's expense the Court of Claims has used as a divisor the number of days actually worked, instead of the entire number of elapsed days from the beginning to the completion of the work; but we do say that if the Court adopts this latter divisor it should be applied to the *elapsed* days (145) of the wrongful detention.

25

Of course, the contractor understood that he would be idle on Sundays and holidays and a considerable number of bad days; but just so did the Government's representatives, when they held him on the work beyond the due time, know that for the days of his postponed labor he would be detained a proportion also of days of bad weather, as well as Sundays and holidays. The court has found in substance that but for the unlawful delays, the work would have been completed by April 25th (Original brief for Ripley, p. 14). What happened to Ripley after that date, the engineers necessarily foresaw. They knew he would be detained many other days besides those on which he should be able to work; and, even by the strictest rule of damages, they must be held to have inflicted on Ripley the burden of the entire elapsed time subsequent to April 25th.

Counsel are right when they say that multiplying the expense (materials excepted) of each elapsed day by "the number of days the Government delayed the contractor" is the way to determine the damages suffered; but the Government delayed the contractor, *i. e.*, held him on the work, 145 days.

We submit that counsel's comparison, at pages 9 and 10 of their reply brief, of the working days previous and subsequent respectively to May 1, 1904, has no relevancy to the case before this court. The court has found that the entire 58 (strictly 60) days of actual labor required after May 1 to complete the work would have been performed before that day if Ripley had not been unlawfully delayed. We are willing that counsel should elect whether Ripley be compensated for the 58 working days at the *per diem* proper to them, \$408.99, or for the 145 elapsed days in which the 58 are included, at the proper *per diem*, \$162.70.

"U. S. agent (U. S. engineer) in charge" is a quotation, as from the specifications, used by counsel at page 7 of their

supplemental brief. We are sure counsel do not intend to mislead the court; but the parenthetical part of this phrase is their own interpolation. Nowhere, we repeat, do the specifications contain in apposition the two terms which counsel here use between quotation marks. The term "engineer" is always used with respect to the large matters, proper to be decided at Galveston; "U. S. agent in charge" is used with respect to the larger of those matters which required decision on the ground; "U. S. agent," is used with respect to the ordinary routine of the work, the mere superintendence, by inspectors, of the placing of material.

In the matter of the inspection charges imposed on Ripley counsel at page 11 of the reply brief assume that the contractor was to be chargeable unless the Government was at fault in the delays; they concede that Ripley was not in fault. In fact the specifications did not relieve the Government of this expense with respect to any delay "arising through no fault of the contractor." Ripley, of course, is entitled to be reimbursed with respect to delays that were providentially caused as well as with respect to those which were caused by improper action of the Government's agents.

It is but justice to the Court of Claims to challenge the position taken by counsel at page 3 of their supplemental brief that the supplemental findings do not import that the core was amply consolidated, and that the inspecting engineer was conscious of that fact, the while that permission to impose the crest blocks was denied. How anything can be "manifest" unless it is a fact, we cannot conceive. Nor could we charge the Court of Claims with not saying that a "gross" mistake was not committed consciously, when the person who committed it was "an old employee" in that particular business; when this person delayed the work for five months or more beyond the time which was required in the performance of other contracts, one earlier and one

later, on the same work, as necessary for this consolidation, and when an engineer of the first rank (Ripley) was constantly pressing the facts upon him. In one particular the court might be deemed whimsical, but that is all. We do not understand why the court after convicting the inspecting engineer in this one particular, and so supporting the judgment given to claimant with respect thereto, should care to inform this court that the evidence does not show him to have been governed by wrong purposes in any other particular: but, to do the court credit, we must give this reading to the findings: they offend rule and reason unless the other and smaller points in the controversy are understood to be the subject of the observation regarding the lack of "other" evidence. *We must give some meaning to the court's word "other".*

We have not included in the present motion the matter of the inspecting engineer's consciousness that he was invading Ripley's rights: this, for the reason just stated, that the findings seem sufficiently clear on that point. If it be proper and desirable, however, we should be glad to argue orally before this court, on the entire findings and the printed evidence now certified, the question of animus, inspired by the superior officers and consulted and reflected by the inspecting engineer, against Ripley as associated with Lewis M. Haupt in the plan of jetty to which the Corps of Engineers at large was opposed.

From what counsel have said in the paragraph commencing at the bottom of page 3 of their supplemental brief it would be inferred that the Court of Claims has made two returns to the mandate of this court. In fact, the Court of Claims revised its original draft of supplemental findings and has made but one return.

This court in its opinion which precedes the mandate of the Court of Claims has not expressed any view as to the

significance of Ripley's sending or not sending to the Galveston office any protest or notice in the matter of the postponement of the laying of the crest blocks; it has merely, in the mandate itself, called for a finding on this isolated fact. This motion is necessarily made contingent upon the court's taking the view from the present record that it was incumbent on Ripley to give such a notice. We respectfully contend, however, that the present record proper (not including the evidence submitted with this motion), on full consideration, shows that no review of the inspecting engineer's decisions in this particular matter was intended by the parties. In this case, of course, the Court might well ignore this motion; otherwise, we submit, the motion should be granted.

Respectfully submitted,

WILLIAM H. ROBESON,
Attorney for Claimant.

BENJ. CARTER,
F. CARTER POPE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 498

HENRY C. RIPLEY, APPELLANT,

VS.

THE UNITED STATES.

No. 499

THE UNITED STATES, APPELLANT,

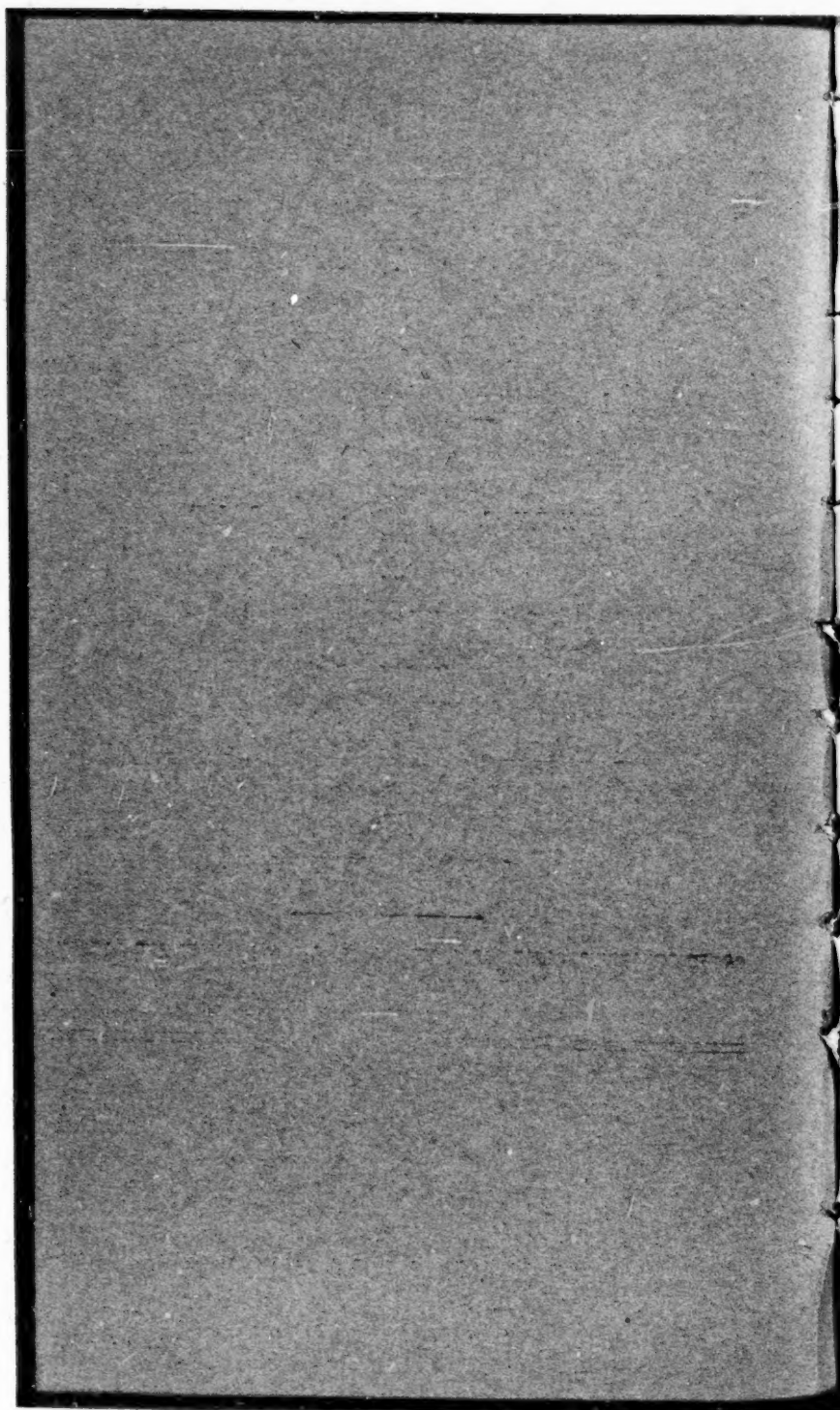
VS.

HENRY C. RIPLEY.

ORDER REMANDING CAUSE FOR ADDITIONAL FINDINGS OF FACTS AND RETURN OF
THE COURT OF CLAIMS THERETO.

FILED MAY 18, 1911.

(22508 AND 22509)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

Nos. 887 and 888.

HENRY C. RIPLEY, APPELLANT,

vs.

THE UNITED STATES.

THE UNITED STATES, APPELLANT,

vs.

HENRY C. RIPLEY.

It is ordered by the court that the record in this case be remanded to the Court of Claims, and that said court be instructed to find and certify to this court, as matters of fact, in addition to the facts found and certified in said record:

First. Whether, when the claimant was laying the slope stones and during the months of December, 1903, and January, February, March, and April, 1904, as recited in Finding VII, the inspector in charge knew "that large parts of the work done by the claimant had fully settled and consolidated."

Second. Whether in the various refusals to permit the laying of crest blocks stated in Finding VII the inspector in charge acted in good faith.

Third. Whether at any time the claimant notified the engineer officer in charge or the Chief of Engineers that the inspector in charge wrongfully refused to permit the laying of the crest blocks, and if such notice was given, whether it was oral or written, when the notice or notices were given, and what action, if any, was taken by such superior officer.

And it is further ordered that the said record, with the said additional findings of fact, be returned to this court with all convenient speed.

April 24, 1911.

Court of Claims of the United States.

HENRY C. RIPLEY	}	No. 28555.
<i>v.</i>		
THE UNITED STATES.		

Order.

Pursuant to the mandate of the Supreme Court in the case of Henry C. Ripley, No. 887, and United States *v.* Henry C. Ripley, No. 888, directing this court to certify additional findings, said court now files said supplemental findings, and directs the clerk to certify the same to the Supreme Court without delay.

[SEAL.]

BY THE COURT.

Filed May 17, 1911.

A true copy.

Test this 17th day of May, A. D. 1911.

Supreme Court of the United States.

HENRY C. RIPLEY, APPELLANT,	}	No. 887.
<i>vs.</i>		
THE UNITED STATES.		

THE UNITED STATES, APPELLANT,	}	No. 888.
<i>vs.</i>		
HENRY C. RIPLEY.		

In response to the order of remand in the above-entitled cause of April 24, 1911, instructing this court to find and certify with all convenient speed, in addition to the facts heretofore found and certified:

First. Whether, when the claimant was laying the slope stones and during the months of December, 1903, and January, February, March, and April, 1904, as recited in Finding VII, the inspector in charge knew "that large parts of the work done by the claimant had fully settled and consolidated."

Second. Whether in the various refusals to permit the laying of crest blocks stated in Finding VII the inspector in charge acted in good faith.

Third. Whether at any time the claimant notified the engineer officer in charge or the Chief of Engineers that the inspector in charge wrongfully refused to permit the laying of the crest blocks, and if such notice was given, whether it was oral or written, when the notice or notices were given, and what action, if any, was taken by such superior officer.

The court finds, supplemental to said Finding VII, as follows:

(1) When denying permission to the claimant to lay crest blocks, as stated in Finding VII, the inspector in charge knew from the time which had elapsed that large parts of the core theretofore completed

by the claimant had fully settled and consolidated and were ready for the crest blocks to be laid thereon.

(2) The refusal of said inspector to allow crest blocks to be laid at the time requested in said Finding VII thereby unreasonably delayed the work and was, on his part, a gross mistake. There is no other evidence of bad faith on the part of the assistant engineer in immediate charge.

(3) There is no evidence to show that any protest or notice was ever made to the engineer in charge (whose office was in Galveston) or to the Chief of Engineers (whose office was in Washington) or to any officer other than the assistant engineer in immediate charge of the work of inspection.

BY THE COURT.

Filed May 17, 1911.

A true copy.

Test this 17th day of May, A. D. 1911.

[SEAL.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

